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No. 01-966

In the Supreme Court of the United States

FRANK O'BANNON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF INDIANA,
Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, JOAN LASKOWSKI, ALICE BENNET, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE STATES OF TEXAS, ALABAMA, MISSISSIPPI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

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Good News Club v. Milford Cent. Sch., 121 S.Ct. 2093 (2001) 7

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Lynch v. Donnelly, 465 U.S. 668 (1984) ..... *passim*

Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) 16-18

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Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) 14

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Zorach v. Clauson, 343 U.S. 306 (1952) 11, 12

Other Authorities

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) 2

Chuck Donovan & Christina Darnell, *Hallowed Ground: Washington's Monuments to Faith, Family and Freedom*, Family Research Council, *available at* http://www.religiousliberty.com/article (last visited Jan. 10, 2002) 13

Display the Ten Commandments: An Important Step in Promoting Morality, Christian Law Association, *availabl e at* http://www.christianlaw.org/display_10c.html 4

Freedom from Religion Foundation, Action Alert (Sept. 5, 2001), *at* http://www.ffrf.org/action/10comm.html (last visited Jan. 5, 2002) 15

Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143 (1994) 8, 9

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John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936 3

John Hostettler, *The Church/State Separation Fallacy*, (Aug. 1, 2001), *available at* 2001 WL 5421955 3

Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00 3

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Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml 3

Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349 3

Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & RELIGION 525 (1999–2000) 9

INTEREST OF THE AMICI CURIAE

Texas and other states have monuments on government property displaying the Ten Commandments, as do many local governmental entities in the states. Litigation seeking to remove or stop the erection of these monuments is occurring frequently around the country. Many well-meaning state and local government officials increasingly find themselves between the proverbial rock and a hard place when confronted by views of the monuments' opponents and proponents. The difficulties of this issue are compounded by the existence of conflicting federal- and state-court decisions on just how far governments may go in acknowledging religion as a part of our national heritage through the display on public property of either solely religious or mixed religious and nonreligious symbols.

This Court has not directly spoken on the issue of government accommodation of mixed secular and religious public displays since 1989 in *County of Allegheny v. ACLU*, concerning seasonal holiday displays. Even though the monument here is not a seasonal holiday display, the Seventh Circuit applied *County of Allegheny*, and the Endorsement Test that it adopted, to decide this case. Despite opportunities over the past twelve years, the Court has not revisited *County of Allegheny* in a mixed religious and secular display context. The amici states respectfully submit the Court should revisit *County of Allegheny* and the Endorsement Test by taking this case. Through this case, the Court will provide state and local government officials much-needed guidance and clarification in this specific area of the law, as well as in the wider context of Establishment Clause jurisprudence. To borrow an expression from Justice Scalia, the amici states are urging certiorari be granted in this case so that the Court may "establish the margins of tolerable

diversity" among the lower courts on the frequently recurring issue of Ten Commandment monuments on public property.[1]

SUMMARY OF ARGUMENT

This case presents an important question of national interest, namely: to what extent may government acknowledge religion as being an important part of our Nation's heritage? By taking this case, the Court would provide much-needed guidance and clarification in this unclear, uncertain, and conflicting area of the law.

Indiana's monument in this case passes constitutional muster under the Establishment Clause. The Establishment Clause is elastic enough to permit monuments such as Indiana's, which simply acknowledges or recognizes the important role the Ten Commandments have played in our nation's history and development.

Finally, the Seventh Circuit has departed from the established precedents of this Court by improperly concluding that Indiana's monument violates the Establishment Clause by impermissibly linking the text of the Ten Commandments to the texts of the Preamble to the 1851 Indiana Constitution and the Bill of Rights in the United States Constitution. Under the Seventh Circuit's flawed "impermissibly links" analysis, no monument on government property displaying a religious text or symbol would ever be constitutional. Linkage of religious and secular texts, alone, does not inevitably lead to the conclusion that government is endorsing religion.

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1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

ARGUMENT

I. THE PERMISSIBILITY OF GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS RAISES A QUESTION OF NATIONAL IMPORTANCE.

There is a debate raging in this country over whether state and local governments may display the Ten Commandments on public property. "What some see as a legal violation, others view as a symbol of our nation's roots." Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml. Opponents often complain that a monument displaying the Ten Commandments "sends the message that people who adhere to its principles 'are the inside, favored group' . . . and people with other beliefs are outsiders." Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431. They see the display as a "thinly disguised attempt[] to use government to promote religion" and send a "distinctly Judeo-Christian message." *See* Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00.

On the other hand, supporters may see efforts to remove or block the erection of such monuments as "part of a systematic campaign . . . to denigrate God . . . in public life" and as "attempts to deconstruct the American way of life." *See id.*; John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936. They view such monuments as an "acknowledg[ment] of their religious heritage," Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349, and as a recognition of the roots of the American justice system. John Hostettler, *The Church/State*